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AUTHORITIES CITED.

Cases:

Only cases referred to are the decisions of the two lower courts in the instant case. Opinion District Court unreported. See, however, Rec. 9–17. Opinion C. C. A., 259 Fed. 793; Rec. 151–162.

Statutes:

Sec. 3, Clayton Act (38 Stat. 731) 2, 8–16, 18, 20

Miscellaneous:

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President's message of January 20, 1914 (Cong. Rec., vol. 51, Pt. II, p. 1163) 14

Report of House Judiciary Committee accompanying Clayton Act 14–18

Report of Senate Judiciary Committee accompanying Clayton Act 14–16, 18, 19

In the Supreme Court of the United States.

OCTOBER TERM, 1921.

STANDARD FASHION COMPANY, PETITIONER,
v.
MAGRANE-HOUSTON COMPANY, RESPONDENT. } No. 20.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE.

UPON REARGUMENT.

INTRODUCTION.

This is the second argument of plaintiff's appeal from a judgment of the Circuit Court of Appeals for the first circuit affirming the action of the District Court for the District of Massachusetts, dismissing plaintiff's bill.

When the case was restored to the docket, the court called the matter to the attention of the Solicitor General.

Examination of the record discloses a question of general public interest with respect to the construc-

tion of section 3 of the Clayton Act (38 Stat. 731). That question is dealt with in this brief. The remaining questions suggested by the record seem to be peculiar to the particular facts. They are not, therefore, dealt with at length.

STATEMENT OF THE CASE.

The plaintiff is engaged in making and distributing paper patterns. It made a contract (plaintiff's Exhibit 7) with the defendant which was then conducting a retail dry-goods business. In this contract, defendants agreed, *inter alia*, "not to sell or permit to be sold on the premises of the second party (the defendant), during the term of this contract, any other make of patterns."

There was a breach of this negative covenant. The plaintiff brought this bill to obtain an injunction. There was a hearing in the District Court at which evidence was taken. (R. 19–139.)

In order to make clear exactly what the issues are in the present discussion it is necessary to state with some particularity what the two lower courts found and ruled.

The District Court (Johnson, circuit judge) found and ruled:

> 1. That the contract in question was still in force when the suit was brought.
>
> 2. That the contract was one of sale and not of agency.
>
> 3. That "the contract must be considered as part of a widely extended system and a conclusion reached as to the legality of the

system. There are in the United States and Canada fifty-two thousand (52,000) so-called pattern agencies and of these the plaintiff and two other companies allied with it through a common holding company control about twenty thousand (20,000), with all of whom a contract like the one we are considering is in force."

4. That under these circumstances the contract is unlawful because its effect may be to substantially lessen competition or tend to create a monopoly. (R. 9–17.)

Accordingly the bill was dismissed.

The Circuit Court of Appeals affirmed this judgment. (259 Fed. 793.) The majority opinion was written by Anderson, Circuit Judge. Bingham, Circuit Judge, concurred.

The Court of Appeals agreed with the District Court's ruling that the contract was in force when the suit was brought—although it noticed that plaintiff's right to an injunction expired February 25, 1919. It also approved Judge Johnson's ruling that the contract was not one of agency but of sale.

The court then turned to the question whether the negative covenant was invalidated by the Clayton Act. It said:

> *On this record we are constrained to find that the restriction may substantially lessen competition and may tend to create a monopoly. It already appears that out of some 52,000 pattern agencies in this country the plaintiff or a holding company controlling it and two other pattern*

> *companies control approximately two-fifths.* (Our italics.)

After some discussion of the necessary effect and tendency of this situation which it said—

> may tend to facilitate further combinations, so that the plaintiff, or some other aggressive concern, instead of controlling two-fifths, will shortly have almost, if not quite, all the pattern business;

it concluded:

> *We must consider this restriction in the light of the facts peculiar to the business to which the restraint is applied, to the conditions already achieved under such restraint, as well as the nature of the restraint and its effect, actual or probable. Viewing it thus, in the light of the surrounding circumstances,* we are constrained to agree with the District Court that the negative covenant in this contract may lessen competition or may tend to create a monopoly—or both—and is therefore obnoxious to the Clayton Act. (Our italics.)

The court noticed also that the contract in question contained a stipulation to maintain resale prices. It did not decide the question whether this fact rendered the contract unenforceable in a Federal equity court, but it cited the familiar decisions of this court as to the invalidity of such provisions.

THE ISSUES.

The plaintiff (brief, p. 4) has stated the issues to be:

> 1. Whether a contract like the one under consideration is unlawful upon its face, or only

where the evidence establishes that its effect may be to lessen competition to tend to create a monopoly.

2. Whether the contract is, indeed, one of "sale" at all within the meaning of the act or a contract of agency or of joint adventure, to which the act does not apply.

3. Whether, if it be a contract of sale, the clause which limits the use of the defendants' premises without affecting its liberty of action elsewhere can possibly fall within the prohibition of the statute.

The first of these propositions can not be accepted as an issue here. The two lower courts did not decide that a contract like the one in suit is unlawful upon its face as distinguished from its being unlawful only where the evidence establishes that its effect may be to lessen competition or tend to create monopoly. As has been shown by a quotation from its opinion, the circuit court of appeals said in terms that such a restriction must be considered in the light of the facts peculiar to the business, to the conditions already achieved under such restraint as well as the nature of the restraint and its effect actual or probable. It was "viewing it thus, in the light of the surrounding circumstances" that the circuit court of appeals agreed with the district court that the negative covenant before it "may lessen competition or may tend to create a monopoly." That by "lessen" the court meant "substantially lessen" is clear from the first of the excerpts from the opinion set out above.

What may be the effect of given conditions under a given set of circumstances is a question of fact. Plaintiff's real complaint is that the two lower courts have successively resolved this question of fact against it upon evidence which it thinks insufficient. This is the criticism made by Brown, district judge, who dissented from the majority opinion while concurring in the result. He thought the state of the proof too "incomplete" to permit a reasonable judgment of the effect of this restrictive covenant. (R. 160.) But he did not lay down a different legal test from that adopted by his colleagues.

So far as there is a question of law respecting the general application of section 3 of the Clayton Act involved in this appeal it would seem to be this: Where it is found that a restrictive covenant "viewed in the light of the surrounding circumstances" may have the effect of substantially lessening competition, is the covenant forbidden by the statute, even though it has not been yet made to appear that that effect has actually been brought about?

ARGUMENT.

I.

Practically speaking, the case is moot.

The bill in this case sought an injunction against the violation of a negative covenant contained in defendant's contract with plaintiff. There was also a prayer for the award of damages. It is admitted by the plaintiff that the contract expired by limitation February 25, 1919. Any right that the plaintiff had

to an injunction expired, therefore, on that day. The plaintiff said in its brief upon its petition for rehearing, page 16:

> While it is plain that the damages resulting from the defendant's undertaking the sale of McCall patterns in its store can not possibly be estimated in their entirety, it *may be* that a *small part* of the damage can be shown. As the defendant has been selling McCall patterns for some time, there is *a bare possibility* that the plaintiff can produce evidence of *some* losses of sales of standard patterns due to the diversion of trade by the defendant to the McCall Co. (Italics ours.)

At other places in this same brief plaintiff emphasizes the difficulties before it in attempting to establish its damages (pp. 4, 5).

In the same document the plaintiff said (p. 2):

> The plaintiff brought this suit to maintain its right to conduct its business in the manner in which it has been conducted for over thirty years, its right to do so having been attacked on the ground that its agency contracts were void under the Clayton Act. It is respectfully submitted that this question concerning the effect of the Clayton Act, which is the only question of any importance in the case, should now be determined by this court in order that the case need not be brought here again and that there may be an authoritative decision concerning the legality of the methods by which the pattern business, and doubtless many other kinds of business, are being conducted throughout the country.

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The Solicitor General is informed that the defendant, appellee here, has ceased to do business and has liquidated its affairs. It has filed with the commissioner of corporations for the Commonwealth of Massachusetts, in which State it was incorporated, a request in due form that it be dissolved and in ordinary course it will be dissolved as a corporation by the incoming legislature of the Commonwealth.

It is respectfully suggested, in view of the appellant's statement as to its possibilities and expectations in the matter of proving damage to it from defendant's breach of the restrictive covenant, and of the situation with respect to the defendant which has just been stated, that there is no question affecting substantial rights of parties before this court now to be decided. What is sought is the view of the court upon an abstract question as to the legality of the business methods of the appellant.

As a matter of substance, if not of technicality, the case is a moot case.

II.

The lower court was right in its construction of the Clayton Act.

Section 3 of the Clayton Act, omitting certain words here inapplicable, is as follows:

> It shall be unlawful * * * to make a sale or contract for sale of goods * * * or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition,

> agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods * * * of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale, or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

In view of the reference in the opinion to the effect of the restraint, "actual or probable," it is not perfectly clear that the court below did not find that the restrictive covenant here had actually resulted in a substantial lessening of competition. Assuming, *arguendo*, that the court did not do that, it is manifest that it is wholly improper to say, as plaintiff does, that the court gave no effect whatever to the proviso with respect to the effect of the conditions forbidden. It did not hold that contracts containing such conditions were bad upon their face without reference to the surrounding circumstances. On the contrary, the court said in terms that it viewed the matter in the light of the surrounding circumstances. So viewing it, it made the specific finding that the case was within the proviso, to which, therefore, it gave full effect.

Reading the whole opinion, it appears that the court ruled that where it could see that the effect of such a condition when so viewed may be to substantially lessen competition or to tend to create a monopoly it was not necessary that it be convinced that such had been its effect or that such necessarily would be its effect.

In this construction of the statute the court was right.

The statute is drawn in simple and nontechnical language and presents no necessity for resort to expressions contained in its parliamentary history in order to resolve doubt as to the meaning of ambiguous language. This is said also by the plaintiff (Brief, p. 42.)

The language used by Congress is "where the effect may be" that described. It did not say "where the effect *is*" or "where the effect *shall* or *will be.*" Had Congress intended that the prohibition should be effective only where the limiting effect upon competition had already appeared the direct and obvious thing to do would have been to say so by using the unequivocal phraseology ready at hand. The fact that words describing a situation where the limiting effect upon competition had already appeared might so easily have been used and were not used is a circumstance of convincing weight. They were not used because that was not what Congress intended.

The explanation attempted by defendants is manifestly not sufficient. This explanation is that Congress used the words "may be" in the sense of futurity "so that the act passed in 1914 would apply to transactions at a subsequent period where at the time the effect of the transaction *would* be to substantially lessen competition or to tend to create a monopoly." (Brief, p. 35.) (Our italics.)

In the first place an act passed in 1914 which says that thereafter it "shall be unlawful" to do a certain thing applies in the future without any further language. If the Congress meant the act to apply only in cases where there *was* a "substantial lessening of competition" actually accomplished, the fact that it proposed to give its statute prospective operation like that of every statute, did not require it to refrain from using the words which would have made clear its purpose. The phrasing of the plaintiff's attempted explanation is a recognition that had that been the purpose of Congress it would have used the word "will" and not "may." It did use "may" because it meant "may" in its established meaning as an auxiliary expressing "ability, competency, or possibility" "contingency or liability; possibility or probability." (International Dictionary.)[1]

All the difficulties that plaintiff conjures up in its reference to the fancies and imaginings which it thinks are given rein by a construction which adopts the plain and primary meaning of the language chosen

[1] Other definitions:

Century Dictionary:

A. As an independent verb or as a quasi-auxiliary: (*a*) To have power, have ability, be able, can; (*b*) to indicate possibility.

B. As an auxiliary: In this use notionally identical with may in the contingent uses above in A (*b*) but serving to form the so-called compound tenses of the subjunctive or potential mode, expressing contingency in connection with purpose, etc.

Standard Dictionary: (1. To have permission); 2. To be contingently possible; (3. To be by chance); 4. To have power or ability.

Concise Oxford Dictionary: Auxiliary expressing possibility, permission, wish, uncertainty.

Oxford Dictionary: II. As an auxiliary: Expressing ability or power, objective possibility in relation to future (may=perhaps will).

by Congress disappear when the matter is looked squarely in the face.

It is true, as plaintiff says, that Congress did not accept a proposed form of the statute which would condemn such restrictions absolutely and at all events. It may very well have thought, as it came to consider the matter, that such a condemnation would produce the evils to which plaintiff refers (brief, 31), namely, make competition by a small manufacturer attempting to enter a field already occupied by a monopoly or by a very powerful economic unit more difficult.

Accordingly it adopted a saving clause admirably designed to avoid this evil while striking forcibly at the more obvious evil effect of the use of such clauses by the existing monopoly or dominant economic unit. It said to the courts, "You shall declare these conditions illegal where you can see that their operation presents a possibility of a certain kind. The possibility is not one of merely lessening competition. But you must, acting in the discharge of your judicial responsibility, see that there is a possibility of a 'substantial' lessening of competition." By so doing it completely avoided the danger to which plaintiff refers. For the use of a given condition by this new competitor entering a field already dominated by a very powerful industrial factor could not in the nature of things present a practical possibility of substantially lessening competition. The Congress thus confined the operation to the statute to the evils against which it was aimed.

It thus made it effective in preserving competition against a device of the most threatening nature. And it made the statute really useful by making it operative before the evil had happened and the competition sought to be protected had been destroyed.

Assuming that the court charged with applying the statute acts judicially and not arbitrarily there is no room here for imaginings or fancies nor for those "hypothetical and unreal possibilities" about which the plaintiff is disturbed. (Brief, 44.) The court must see that there is a definite and real possibility of a substantial lessening of competition. There is nothing intrinsically so difficult about the determination of the question whether in a certain situation disclosed to the court there is a possibility that there will result a substantial lessening of competition as to make it in any degree improper to commit that determination to a court. Nor is the kind of question one with which courts are incompetent to deal.

The inclusion of the word "substantially" in the proviso gives the proviso its character and accomplishes its purpose. By inserting it Congress wrote into the statute itself that "rule of reason" in the light of which the statute was to be applied.

What is thus seen to be true as to the construction of the statute when its language alone is considered becomes even more manifest when the parliamentary history of the legislation is taken into account. The court below sets out certain portions of this history which it regarded as convincing. The plaintiff sets out in its brief certain other portions from which it

draws a different conclusion. When the whole of the subject matter is considered it will be seen that the conclusion as to the construction of the statute which the court drew, principally from the language used, was certainly right.

The Clayton Act was drawn in response to the President's message of January 20, 1914 (Cong. Rec. vol. 51, Pt. II, p. 1163), in which the President referred to the fact that many processes which led toward monopoly were already sufficiently familiar to make definition possible and suggested to Congress that those practices should be forbidden explicitly "in such terms as will practically eliminate uncertainty."

The reports of the respective Judiciary Committees of the House of Representatives and of the Senate accompanying the introduction of the Clayton Act in those bodies are justly relied upon by the court below as throwing convincing light, if indeed anything more than the language of the statute is necessary, upon the purpose of Congress and the meaning of what it did. Since the plaintiff insists that these reports should not be used for this purpose because it contends that they were made "with respect to a proposed section of the law which was finally rejected and abandoned by both Houses" (brief, 20) it is helpful, before taking up the reports to see just what differences there are between the final form of the bill and its form when the reports in question were made regarding it. By so doing it can be determined whether the Court of Appeals

was right in saying that while debate and conference modified the legislators' views as to the best method of dealing with the evils aimed at, there was no abandonment of the main purpose expressed in the committee reports.

Below the text of the section is given as it was finally enacted. The language inserted by the conference committee is printed in italics. That inserted by the Senate is printed in small capitals. That contained in the original House bill is printed in ordinary roman.

> IT SHALL BE UNLAWFUL FOR any person engaged in commerce, *in the course of such commerce,* TO lease or make a sale OR CONTRACT FOR SALE of goods, wares, merchandise, machinery, supplies, or other commodities, WHETHER PATENTED OR UNPATENTED, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, *where the effect of such lease, sale, or contract for sale, or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.*

The court's reference to modification of the legislative view as to the best method of dealing with the evil aimed at is to the principal difference between the original draft and the form in which the statute passed. This change was made by the Senate committee. The House had made the section provide "that any person who shall lease" etc. "shall be guilty of a misdemeanor and upon conviction shall be punished." The Senate altered this by substituting for the criminal sanctions a declaration that the acts described should "be unlawful" and left the enforcement of the statute to appropriate civil process. But the acts made unlawful were described in the same language in the bill as reported to and passed by the House and in the bill as reported to the Senate. The House inserted in the committee draft the word "agreement" in the phrase "condition, agreement, or understanding." In the Senate, there were inserted the words "whether patented or unpatented" and the words "or contract for sale." These changes obviously only strengthened and broadened the bill. The change made by the conference committee was to *add* the qualification with respect to the effect of the acts. This undoubtedly limited the scope of the section. But it indicated no change in the purpose of Congress as indicated by the committee reports.

With this statement of the textual history of the bill one comes to the reports in question.

The House committee, explaining section 4 (now section 3), said:

Let us therefore consider what this section really accomplishes. It prohibits the exclusive or tying contract made between the manufacturer and the dealer by purchase or lease whereby the latter agrees, as a condition of the contract, not to use or deal in the commodities of the competitor or rival of the seller or lessor. * * * What is the motive of the manufacturer in making or entering into such exclusive contract? It is undoubtedly his purpose to drive out competition and to establish a monopoly in the sale of his commodities in that particular locality or community. * * * In this connection it is important to state that to-day, in every village and locality where there is only a single store and this exclusive or tying contract is entered into between the manufacturer and local dealer concerning any commodity, the exclusive or tying contract gives both the manufacturer and the local dealer a complete monopoly of that particular commodity in the locality or community. * * * *Where the concern making* these contracts is already great and powerful such as * * * (certain particular named corporations) the exclusive or tying contract made with local dealers becomes one of the greatest agencies and instrumentalities of monopoly ever devised by the brain of man. It completely shuts out competitors not only from trade in which they are already engaged, but from the opportunities to build up trade in any community where these great and powerful com-

> binations are operating under this system and practice. * * *.

The report of the Judiciary Committee of the Senate is even more striking because it contains a direct statement of the legislative purpose. The committee said:

> Broadly stated, the bill, in its treatment of unlawful restraints and monopolies, seeks to prohibit and make unlawful certain trade practices which, as a rule, singly and in themselves are not covered by the act of July 2, 1890, or other existing antitrust acts, and thus, by making these practices illegal, to arrest the creation of trusts, conspiracies, and monopolies in their incipiency and before consummation. Among other of these trade practices which are denounced and made unlawful may be mentioned * * * exclusive and tying contracts * * *.

This expression of congressional purpose shows that Congress intended the statute to become operative as a preventive before the evil had arisen. It proposed to prohibit this means of substantially lessening competition before the lessening had occurred—in its very incipiency. It was not content to order the removal of the scaffolding after the structure of monopoly had been erected by its use.

The individual expressions of opinion of particular members of the legislature are of little value in a question of this kind, but as will be seen from the quotations made in plaintiff's brief they show no abandonment or change of this purpose of the re-

sponsible committee. The Senate did come for a time to the conclusion that because of the Trade Commission bill the section was unnecessary. But it changed its opinion and the bill, as it came from conference, and was accepted by Senate and House, contained the section word for word as it had been reported by the Senate committee with the explanation quoted above, with the addition of the clause as to the effect of the restrictive provisions—a clause which was wholly consonant with the purpose expressed by the committee and which, indeed, gave the statute the precise effect which the Congress intended. Certainly the Congress although modifying, as above indicated, the bill as originally drawn never rejected and abandoned it in any essential detail.

If, then, resort is had to the parliamentary history of the statute, the intention of Congress manifest from the language used becomes even more plain. The court below was right.

Another thing that stands out from the report of the Senate committee is its recognition that among the things with which Congress proposed specifically to prohibit were some "which, as a rule, singly and in themselves are not covered by * * * existing antitrust acts." It intended to change the law. This intention is important in view of plaintiff's elaboration of decisions that restrictions like these had been held not to be invalid under various State antitrust statutes. Apart from the language of the committee, the enactment of so specific a pro-

hibition in the light of these decisions and other decisions that analogous restrictions were not invalid at common law or under the Sherman Act is, as the court remarked, in itself ground for an inference that the legislature intended, in the light of experience, to change the law. And the Court of Appeals well said:

> There is no answer to the suggestion of Judge Trieber in *United States* v. *United Shoe Machinery Company* (234 Fed. 127, 150), that the "presumption is, not that Congress intended that the construction of the Sherman Act should control, but, on the contrary, that it should not control * * *. Evidently Congress was not satisfied to only prohibit actual lessening of competition, or monopolizing, but to make it unlawful for any person to do these acts, which may put it in his power to do so.

III.

The contract was one of sale.

Section 3 of the Clayton Act applies to leases, sales, and contracts for sale. Plaintiff contends that its contract, properly construed, is neither of these but that it merely establishes a local agency.

The court below held that as title to patterns supplied to defendant passed to it, the transaction was one of sale despite the other terms with respect to the return of unsold patterns for credit to which plaintiff calls attention.

Plaintiff somewhat overstates the effect of the provisions upon which it relies. It is true that defendant agreed to return unsold patterns upon the expiration of the contract, but the penalty for not so doing appears only to be that plaintiff is released from any obligation to redeem them.

Nor is it true that "the only use which the defendant could make of the patterns was to sell them to the public or return them to the plaintiff." (Brief, 58.) It could make any other use of them which any owner could make. It could, for instance, give them away.

The construction of this particular contract affects only this particular suit. It is not deemed necessary to expand the discussion of this point. The Court of Appeals would, however, seem to have dealt with it correctly.

IV.

The contract was on the condition forbidden by the statute.

The language was:

> Second party also agrees * * * not to sell or permit to be sold on the premises of the second party, during the term of this contract, any other make of patterns.

Plaintiff says this is not an "agreement not to deal in the goods of a competitor of the plaintiff" but is no more than "a restriction of the use" of defendant's premises "for a limited time."

Exactly what force there is in thus describing the agreement is not clear unless the contention is that if the agreement leaves to the vendee any place in which he may sell the goods of competitors of the vendor it is not within the statute. This would exclude an agreement by the vendee that he would not sell competing goods except in the island of Yap even though the vendee had never had any place of business in the island of Yap and had no intention of establishing a branch in that picturesquely named locality. It is a familiar rule of construction that a statute will not be given a meaning which will defeat its purpose and lead to absurd consequences. That rule would seem to be enough to dispose of such a contention as this.

As a matter of fact the agreement here covered the "defendant's store in Boston," the only place in which defendant was engaged in any business. It referred however to no specific premises and was broad enough to cover any premises upon which defendant had or might acquire the right to engage in the sale of patterns.

It is not plain that the words "on the premises of the second party" are not limited in their application to the phrase "permit to be sold." This would be a natural construction since they thus define the territory within which defendant's control of the action of third persons would be effective. Assuming however that defendant's agreement was "not to sell upon the premises" controlled by it, this was in express words an agreement not to deal in

the goods of others than plaintiff. This fact is neither altered nor obscured by describing the agreement as a restriction upon defendant's use of its premises. Any agreement not to deal in the goods of others, however phrased, would be to some extent "a restriction upon the use of defendant's premises." That fact would seem immaterial.

There might be an agreement not to sell competitor's patterns so limited in effect by express permission to sell outside a certain restricted area that the effect of the agreement upon competition could not be substantial. It would, however, still be an agreement not to deal in the goods of competitors and the present argument of plaintiff would fail.

CONCLUSION.

The question of fact as to the effect of the particular restrictive covenant upon competition was resolved against the plaintiff by two courts. It does not seem necessary to argue it in a brief written for the present purpose.

As to the rulings of law, the Circuit Court of Appeals was right.

JAMES M. BECK,
Solicitor General.
LA RUE BROWN,
ELIAS FIELD,
Special Assistants to the Attorney General.

JANUARY, 1922.

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